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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

QUALITY FINANCIAL, INC.,

Plaintiff and Respondent,

v.

POWER LEASING et al.,

Defendants and Appellants.

G041099

(Super. Ct. No. 07CC07354)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Gregory H. Lewis, Judge. Reversed and remanded.

Law Offices of David J. Altman and David J. Altman for Defendants and Appellants.

No appearance for Plaintiff and Respondent.

\* \* \*

We reverse a default judgment under the mandatory relief provision in Code of Civil Procedure section 473, subdivision (b).<sup>1</sup> Defendants filed a timely motion for mandatory relief, with an attorney declaration of fault.

Clearly, the attorney was at fault. He did not believe he had to file an answer because the trial court had set a status conference and a trial date. Before the filing deadline for answering, the attorney became seriously ill, requiring hospitalization and a medical leave of absence. The trial judge discounted the attorney's reasoning, but the mandatory relief statute requires relief for *all* attorney mistakes, whether excusable or *inexcusable* so long as there is no reason to infer the attorney is trying to cover up for the fault of the client. No such reason exists here. The lawsuit should be reinstated.

## I

### FACTUAL AND PROCEDURAL BACKGROUND

Defendants Power Leasing, a car dealer, and Jack Altman and Ernie Sandoval, its principals, sell cars to the general public. In 2006, defendants entered into a dealer agreement with plaintiff Quality Financial, Inc. (Quality), a lender, to provide automobile loans to defendants' customers. The agreement called upon Quality to hold the certificates of title as collateral until the customers paid off their automobile loans.

In June 2007, Quality sued defendants when three customers defaulted on their loans. Quality alleged that defendants were contractually obligated to repurchase the loan agreements.

Quality secured a clerk's entry of default against two of the three defendants in 2007. On February 11, 2008, after defendants retained counsel, the trial

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<sup>1</sup> All statutory references are to the Code of Civil Procedure unless otherwise noted.

court vacated the defaults and ordered all defendants to answer. The court set a trial date for mid-June 2008.<sup>2</sup>

On March 3, 2008, before the new deadline to answer, defense counsel began to experience abdominal pain and swelling, and took a sick leave from his practice. He subsequently was hospitalized for nearly two weeks, and remained bedridden through April. He returned to his law practice on April 28.

Defendants never answered the complaints. On April 4, 2008, Quality obtained a clerk's default against defendant Jack Altman. (It is unclear whether Quality obtained new clerk's defaults against the other two defendants.) Quality subsequently filed a request for a default judgment against all defendants.

In May 2008, defendants filed their motion for relief from default pursuant to section 473, subdivision (b). They attached a declaration from defense counsel about his "grave illness," and his belief that no answers were necessary because the court at the February 11 hearing had already "vacated all prior entries of default, . . . found that the matter was contested by the Defendants and the case was at issue, . . . set a [mid-June] trial date . . . and . . . urged the parties to begin discovery." Defendants attached a proposed answer.

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<sup>2</sup> Defendants did not designate the February 11, 2008, minute order, nor have they asked that the record be augmented to include it. (Cal. Rules of Court, rule 8.155(a).) Instead, defendants improperly ask us to take judicial notice of the February 11 minute order in a footnote in their appellants' opening brief. We deny the request. Both augmentations and requests for judicial notice require formal noticed motions filed separately from the moving party's brief. (Cal. Rules of Court, rule 8.252(a)(1).)

Fortuitously, the trial court repeated the gist of its February 11 minute order in a subsequent minute order. The July 7, 2008, minute order states, "On 2-11-08, the Court ordered that an answer be filed. In addition, although *entry of default was vacated*, Defendants are still in default from the time they were served." (Italics added.)

On July 7, 2008, the trial court denied defendants' motion for relief. The court entered a default judgment for nearly \$33,000, including prejudgment interest and attorney fees. Defendants timely appealed.

Quality neither counterdesignated a record nor filed a respondent's brief. It instead filed a motion to dismiss the appeal as frivolous, relying upon documents and records that its counsel purported to authenticate as exhibits. The declaration also contained additional facts that were outside the appellate record.

Quality cannot use the mechanism of a motion to dismiss to circumvent the record preparation procedure in the California Rules of Court. As a result of Quality's failure to file a brief, we consider the default judgment solely upon "the record, opening brief, and any oral argument by appellant." (Cal. Rules of Court, rule 8.220(a)(2).)

## II

### DISCUSSION

Section 473, subdivision (b), provides for discretionary and mandatory relief from default. The discretionary relief provision permits relief for mistake, inadvertence, surprise, or excusable neglect. The mandatory relief provision requires the court to grant relief where the attorney files a declaration of fault. (§ 473, subd. (b).) "The purpose of the mandatory relief provision is to relieve the innocent client of the burden of the attorney's fault, place that burden on the malfeasant attorney and avoid triggering more litigation in the form of a malpractice suit. [Citations.]" (*Esther B. v. City of Los Angeles* (2008) 158 Cal.App.4th 1093, 1100.) While the attorney's conduct must be a cause in fact of the entry of default, it need not be the *only* cause. (*SJP Ltd. Partnership v. City of Los Angeles* (2006) 136 Cal.App.4th 511, 520 (*SJP*).)

There are different time limits for discretionary and mandatory relief. Defendants may seek discretionary relief within six months after the clerk's entry of default. Mandatory relief applications based on an attorney declaration of fault have a

more liberal time frame; they must be filed no more than six months after entry of a default judgment. (§ 473, subd. (b).)

The mandatory relief provision directs that “whenever relief is granted based on an attorney’s affidavit of fault [the court shall] direct the attorney to pay reasonable compensatory legal fees and costs to opposing counsel or parties.” (§ 473, subd. (b).)

The trial court has no discretion to deny relief to defaulted litigants who meet the statutory requirements for mandatory relief based on attorney fault. (*SJP, supra*, 136 Cal.App.4th at p. 516.) Relief under the mandatory provision is available whether or not the attorney’s neglect is excusable or reasonable. (*Matera v. McLeod* (2006) 145 Cal.App.4th 44, 63.) We review de novo the application of the mandatory relief provision, unless the trial court’s determination turns on disputed facts. (*SJP*, at p. 516.)

There are circumstances where trial courts may deny mandatory relief even with an attorney declaration of fault. For example, the facts may support the inference that the attorney was not at fault, but was merely taking the blame for the client. (*Rogalski v. Nabers Cadillac* (1992) 11 Cal.App.4th 816, 821.) Or, the court may find the client’s *intentional* misconduct, at least in part, led to the entry of default. (*Benedict v. Danner Press* (2001) 87 Cal.App.4th 923, 929-931.)

Defendants’ motion for relief from default did not explicitly state it was based on both the mandatory and discretionary relief provisions of section 473, subdivision (b). Nonetheless, the record adequately establishes that defendants sought mandatory relief based on attorney fault. “An omission in the notice [of motion] may be overlooked if the supporting papers make clear the grounds for the relief sought. [Citations.]” (*Luri v. Greenwald* (2003) 107 Cal.App.4th 1119, 1125.) Here, defendants’ moving papers referred to *both* the discretionary and the mandatory elements of section 473, subdivision (b), stating: “A trial court has great discretion to vacate entries

of default and default judgments. [Citations.] Indeed, such relief is mandatory if the reasons for the entry of default lie with counsel. [Citations.]”

At oral argument, defense counsel emphasized that he alone, not his clients, was to blame for defendants’ failure to timely file an answer following the February 11, 2008, hearing when the court vacated the clerk’s entry of defaults and ordered defendants to answer: “I want to be very respectful to the court and say, it very well could be that the court . . . did tell defendants to file an answer. I simply didn’t hear it. . . . I deeply apologize to the court for that, but I thought we were at issue. I thought we were getting started on the case. [¶] Now, unfortunately for me, I ended up in the hospital a short while after that. But in terms of the original mistake, in terms of the not filing of an answer, that was entirely not my client’s fault. That was mine because I thought we were at issue. [¶] . . . [¶] So I think, Your Honor, just on that basis, the mandatory part for [section] 473 [subdivision] (b) controls, and that the court should based on that, you know, act to vacate the default. I’m certainly within the time limits since an entry of judgment hasn’t even been entered in this court yet.”

The defendants’ timely motion unmistakably established that defendants played no part in counsel’s failure to file answers following the February 11 hearing. Indeed, the trial court itself asserted at the hearing that defense counsel bore sole responsibility for the default: “*The real reason no answer was filed is that the attorney decided it didn’t have to be. . . .* How could you, Mr. Altman [referring to defense counsel] possibly have believed no answer was due? The declaration is simply in that regard not credible.” (Italics added.)

This is sufficient to entitle defendants to relief under the mandatory relief section of section 473, subdivision (b). Defense counsel established that he failed to act on behalf of his client when he was obligated to do so. While the trial court chafed at counsel’s explanations, the statutory provision absolves even the inexcusable and creates a mandatory duty to relieve the clients of the burden caused by attorney error.

Accordingly, the default judgment must be reversed and the default vacated, allowing defendants to file their answer. Of course, nothing prevents Quality from again taking defendants' default if defendants fail to answer within the time granted by the trial court on remand. Moreover, in accordance with section 473, subdivision (b), the trial court shall direct defense counsel to pay reasonable compensatory legal fees and costs, if any, to opposing counsel or parties.

### III

#### DISPOSITION

The judgment is reversed, and the cause remanded for further proceedings in accordance with this opinion. Appellants are entitled to costs on appeal.

ARONSON, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

FYBEL, J.